NO. 2434.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Appellant,

vs.

ASH SHEEP COMPANY, a Corporation,
Appellee.

APPELLANT'S BRIEF.

BURTON K. WHEELER,
United States Attorney, District of Montana.

HOMER G. MURPHY,
FRANK WOODY,
Assistant U. S. Attorneys, District of Montana.

NAEGELE PRINTING CO., HELENA, MONT.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Appellant,

VS.

ASH SHEEP COMPANY, a Corporation,
Appellee.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

The present is an appeal from a decree entered by the District Court of the United States in and for the District of Montana on the 26th day of December, 1913, in favor of the appellee herein and against appellant.

The suit is one brought by appellant to enjoin an alleged trespass by appellee on certain lands, alleged to be a part of the Crow Indian Reservation in the State and District of Montana. The allega-

tions of the complaint may be briefly summarized as follows:

After the formal allegations of the authorization of the suit by the Attorney General and the corporate capacity, business and residence of appellee, it was alleged that in 1868 appellant and the Crow Tribe of Indians entered into a treaty by which appellant set aside, for the use and benefit of said Indians, the Crow Indian Reservation (Tr. pp. 2-3); that appellant was and is the owner of and entitled to the possession of the lands particularly described in the complaint, and said lands were within the original boundaries of said Reservation and a part of the lands set aside by appellant and reserved for the use and benefit of said Indians (Tr. p. 3); that said described lands are a part of the vacant ceded lands of said tribe; that the Indian title has not been extinguished; and said lands are subject to the rules and regulations, made and promulgated by the Secretary of the Interior of the United States, concerning Indian lands that have been opened for settlement and entry, dated November 27th, 1911, and the Act of Congress of the United States, approved April 27, 1904 (33 Stat. at Large 352) (Tr. p. 3);

That appellee, in violation of the rules and regulations of the Secretary of the Interior and said Act of Congress, grazed and caused to be grazed upon the tracts of land, described in the complaint, and other vacant ceded lands of said Reservation, about 7100 head of sheep, without any

authority or permit to graze the same as provided by the rules and regulations of the Secretary of the Interior, or any other official of appellant (Tr. p. 4);

That grazing permits for said lands had been duly and regularly issued by appellant to certain persons, and that said persons had complied with said rules and regulations of the Secretary of the Interior and paid all fees required (Tr. pp. 4-5);

That appellee without any permit or authority was grazing and would continue to graze its sheep upon said lands unless restrained, and claimed to have the right so to do, and by such grazing would prevent and prohibit appellant from asserting any right whatsoever in and to said lands; that such acts constituted a continuing trespass and would materially injure the use and value of said lands and cause irreparable injury and damage to appellant and deprive said Indians of the use and benefit of said lands (Tr. p. 5); that in consequence of said acts of appellee, and the continuance of them, appellant and said Indians are being deprived of the use and benefit of said lands and premises and have been damaged in the sum of $7100.00 (Tr. p. 6).

To this complaint, appellee filed its answer by which it denied that said lands are set aside by appellant for the use and benefit of said Indians and alleged that said lands are a portion of the public domain; that said Indians have no claim thereto, except that the proceeds from the disposition of said lands, as provided in said treaty shall be turned

over to said Tribe of Crow Indians (Tr. pp. 11-12); appellee further denied that the Indian title to said lands had not been extinguished and denied that said lands were subject to said rules and regulations of the Secretary of the Interior, and alleged that said lands were public lands of the United States and the Indian title thereto wholly extinguished (Tr. p. 12);

Appellee admitted that its sheep had grazed upon said lands but denied that said lands were reserved for the use and benefit of said Indians and that the use thereof is subject to the rules and regulations of the Secretary of the Interior and denied that in so grazing said lands any trespass was committed (Tr. p. 12); appellee admitted that such grazing was without any permit but alleged that it had a right to graze said lands by reason of the fact that the same were a part of the public lands of the United States (Tr. pp. 12-13). Said answer also denied on information and belief, that any grazing permits for said lands had been issued to others who had paid for the same and complied with the rules and regulations of the Secretary of the Interior (Tr. p. 13); appellee admitted that it would continue to graze said sheep on said lands unless restrained from so doing; denied that such grazing constituted a trespass or would injure or at all destroy the value of said lands; denied that such grazing was a violation of law or any right of appellant and admitted that it claimed the right to so graze said sheep and averred that such grazing

was in accordance with the public policy of appellant as to its public lands (Tr. p. 13). Appellee further alleged that there was a misjoinder of actions in the bill of complaint. (Tr. p. 14).

Upon the hearing of an order to show cause, issued at the time the suit was commenced, the court denied the application for a preliminary injunction and vacated a temporary restraining order theretofore issued against appellee, at the same time handing down a lengthy decision (Tr. pp. 16-22), and thereafter, on December 16th, 1913, the matter coming on for hearing, the court, for the reasons set forth in its said decision denying a preliminary injunction, dismissed the suit (Tr. p. 23); and thereafter on December 26th, 1913, the decree herein appealed from was entered (Tr. pp. 23-24) and this appeal was perfected on the 20th day of May, 1914 (Tr. pp. 25-30).

SPECIFICATIONS OF ERROR RELIED ON.

FIRST: Because the Court erred in finding that the Indian title to the lands described in the said decree and involved in the above-entitled action had been extinguished.

SECOND: Because the Court erred in finding that Congress had incorporated the said lands in the general mass of public lands to be opened to settlement and sale, in pursuance to the general land laws of the United States of America, by persons qualified to settle upon or purchase said lands.

THIRD: Because the Court erred in finding that exclusive permits to graze said lands are void and without authority and legal sanction.

FOURTH: Because the Court erred in finding that the Commission of Indian Affairs had no authority to exercise control over said lands and issue grazing permits for the use of the same.

FIFTH: Because the Court erred in refusing to find that said lands are lands in which the Crow tribe of Indians are interested and entitled to the use and benefit thereof until such lands are finally sold or disposed of in pursuance with the agreement of said Crow tribe of Indians as modified by the Act of Congress of April 27, 1904, ratifying the said agreement, by which said Crow tribe of Indians agreed to sell said lands to said complainant, and complainant agreed to sell and dispose of the same for said Crow tribe of Indians.

SIXTH: Because said Court erred in refusing to find that said lands were held by the United States of America in trust for the use and benefit of said Crow tribe of Indians.

SEVENTH: Because the Court erred in holding that complainant's bill of complaint herein states no cause for relief in equity.

EIGHTH: Because the Court erred in holding that, under the pleadings herein, complainant was entitled to no relief in equity as prayed for in the bill of complaint.

NINTH: Because the Court erred in entering a decree dismissing complainant's bill of complaint.

ARGUMENT.

The contentions of appellant, as shown by the foregoing specifications of error, may be most conveniently subdivided and considered under the following heads: The Indian Title and Interest in the Lands, covered by Specifications First, Second, Fifth and Sixth; The Authority of the Secretary to Issue Grazing Permits, covered by Specifications Third and Fourth; and the Decree, covered by Specifications Seventh, Eighth and Ninth.

THE INDIAN TITLE AND INTEREST IN LANDS.

It is admitted by the pleadings that the lands described in the complaint were a part of the lands embraced within the original boundaries of the Crow Indian Reservation. The most important matter for consideration here is whether by the Act of Congress approved April 27, 1904 (33 Stat. at Large 352), amending and ratifying an agreement with the Crow Indians, the Indians parted with all their rights and interests in the lands and accepted in payment for such conveyance a mere promise that the United State would at some time, when possible to so do, sell the lands and apply the proceeds to the credit of the Indians as therein specified, so that said lands thereby became public lands of the United States.

The Act itself, in so far as the matter under consideration is concerned, provides:

"That said agreement be, and the same is hereby, modified and amended to read as follows:

"Article I. That the said Indians of the Crow Reservation do hereby cede, grant and relinquish to the United States all right, title, and interest which they may have to the lands embraced within and bounded by the following described lines: (Description follows) * * *

"Article II. That in consideration of the land ceded, granted, relinquished and conveyed by article one of this agreement the United States stipulates and agrees to dispose of the same as hereinafter provided under the provisions of the Reclamation Act approved June seventeenth, nineteen hundred and two, the homestead, townsite, and mineral land laws, except sections sixteen and thirty six, or an equivalent of two sections in each township, at not less than four dollars per acre, subject to the provisions of section 5, the United States to pay for sections sixteen and thirty six, or an equivalent of two sections in each township, at one dollar and twenty-five cents per acre, and to pay the said Indians the proceeds derived from the sale of said lands, and for the said sections sixteen and thirty six, or an equivalent of two sections in each township, as follows: * * *

"Art. VII. The existing provisions of all former treaties with the Crow tribe of Indians not inconsistent with the provisions of this agreement are hereby continued in force and

effect, and all provisions thereof inconsistent herewith are hereby repealed. * * *

Sec. 3. * * * there is hereby appropriated out of any money in the Treasury not otherwise appropriated, the sum of forty thousand dollars, or so much thereof as may be necessary, for the completion of the survey and subdivision of said ceded lands, the same to be reimbursed out of the first moneys to be received from the sale of said lands.
* * *

Sec. 8. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land as herein provided, or to guarantee to find purchasers for said lands or any portion thereof, it being the *intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided.* (Italics ours.)

33 Statutes at Large 352.

To determine whether or not the Indians have, by said agreement, completely extinguished all their right, title and interest in and to said lands, the rule laid down by the Supreme Court of the United States in the case of Worcester v. Georgia, 31 U. S. (6 Pet.) 582, is the one governing us in the inter-

pretation of the Act of April 27, 1904, *supra.* In said case Chief Justice Marshall said:

> "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

See also:

> The Kansas Indians, 5 Wall. 737, 760;
>
> Choctow Nation v. U. S., 119 U. S. 1,-28.

In the case of Chickasaw Nation v. U. S., 32 Ct. Cl. 222, 228, it was said:

> 'The courts in all controversies between the Government and the Indian tribes have adopted a theory of interpretation favorable to the tribes; and while the rules of law applicable to such controversies are not so strict as those governing differences between guardian and ward, they go to this extent, as has been held, that doubts are to be resolved in favor of the Indians, that they are not to be prejudiced by mere technical construction, and that words of doubtful import are to be taken most strongly against the United States."

The Act of Congress approved April 27, 1904,

supra, is one that was passed ratifying and amending an agreement which the Crow Indians had entered into, in the month of August, 1899, with the United States. In construing said Act and applying the rule of construction, applicable to Indian treaties, to the said agreement and Act now under consideration, it should be remembered that Congress did not ratify said agreement as it was signed and agreed to by the Indians, but undertook to and did amend said agreement in several particulars, and the amendments with which we are concerned are the following:

In the original agreement the Indians agreed to "cede, grant and relinquish to the United States all right, title and interest which they may have to the lands embraced within and bounded by the following described lines (describing them); and for such cession and grant the Indians agreed to receive a specified consideration, which is recited in said agreement as follows:

> "Article II. That in consideration of the land ceded, granted and relinquished as aforesaid, the United States stipulates and agrees to pay to and expend for the Indians of the said Reservation eleven hundred and fifty thousand dollars, in the following manner," (Specifying manner of expenditures).

See Original Agreement in 33 Stat. at L. 352.

But this Article of the original agreement was stricken out and Article II in Section 1 of said Act

inserted by Congress. A most careful examination of this original agreement, as signed by the United States and said Crow Indians, fails to disclose any mention of the manner in which the United States was to dispose of said lands, or any reservation or restriction upon said cession and grant to the United States, except that any Indians then allotted or residing upon any portion of the ceded tract could retain such allotments or place of residence, if they so desired, but said agreement does disclose the fact that the Indians for and in consideration of eleven hundred and fifty thousand dollars, to be paid them, intended to and did agree to make an absolute cession and grant of said lands to the United States, relinquished and giving up all rights and claims they had in or to said lands which they had enjoyed under the original treaty dated July 25, 1868, (15 St. at L. 629).

When this agreement of August, 1899, came up before Congress for ratification and acceptance, Congress refused to purchase said lands outright, as the Indians desired it to do, but so amended said agreement that the United States was only "to act as trustee for said Indians to dispose of said lands," for stipulated prices and in particular manners and to pay over to and expend the proceeds of said sales for the benefit of said Indians, only as the lands were disposed of and after reimbursement for the expenses connected with the survey and sale of said lands.

By comparing the original agreement and the

agreement as amended and then ratified and accepted it is clear that Congress did not intend that the United States should become the purchaser of said lands but intended the United States to act as a trustee for the sale of said lands, as the medium through which sales might be made. In other words by the agreement, as amended, Congress intended to create an express trust, the United States being the trustee and the Tribe of Crow Indians the *cestui qui trust.*

When the Indians entered into the Agreement of August 1899, they expressly stipulated that "should any article in the agreement fail of confirmation by Congress, then the whole shall be null and void." Of course by accepting the amendments made by Congress through acquiesence in such amendments the Indians have ratified the Act of April 27, 1904, *supra,* but inasmuch as they were not present and took no part in any discussion leading up to the enactment of said Act amending the agreement the rule of construction of Indian treaties, heretofore cited, should apply with greater strictness and any ambiguity in said Act caused by Congress inserting the amendments it did, should be resolved in favor of the Indians. These amendments absolved the United States from any liability by reason of a failure to dispose of the lands, expressly stipulating that it was not to be obligated to purchase any of the lands ceded except sections 16 and 36, or their equivalent, and even granted the United States, when any lands remained undisposed of

after a certain period and the President saw fit so to do, the power to dispose of such remaining lands at such prices as could be obtained, regardless of any minimum and the proceeds were to be paid to or expended for the Indians regardleses of the manner of sale.

Sec. 8, Act of April 27, 1904, (33 St. at L. 352) expressly provides that the United States shall act as "trustee to dispose of said lands for said Indians".

It clearly was the intention of Congress not to purchase said lands, but in pursuance of the policy which it had adopted towards other Indian reservations in Montana, it desired merely to open up the lands to settlement by selling them for the benefit of the Indians. To show that this contention is correct it is fitting at this time to refer to a section which is contained in Acts opening up the Crow, Fort Peck, Flathead and Blackfeet Indian Reservations in the State of Montana, which is as follows:

> "That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received

from the sale thereof only as received, as herein provided."

Flathead Reservation, Act of April 23, 1904, 33 St. at L. 302;

Crow Reservation, Act of April 27, 1904, 33 St. at L. 352;

Blackfeet Reservation, Act of Mar. 1, 1907, 34 St. at L. 1035;

Fort Peck Reservation, Act of May 3, 1908, 35 St. at L. 558.

In construing treaties and Acts opening Indian reservations to settlement even when the treaty or Act failed to contain any express declaration of trust but did provide for the sale of the lands by the United States for the benefit of the Indians, the courts have held that the United States did not take the absolute title to the lands opened for settlement and sale, but only acted as a trustee.

"By the two treaties of 1832 and 1834 the United States undertook a general supervision and care of the Chickasaws; a supervision and care more detailed in definition, more important in essence, than that of trustee to cestui que trust, or even that of guardian to ward, in effect much resembling the relation of parent to child. The Indian lands were to be surveyed and sold by the United States; the proceeds were to be invested and held for the Indians by the United States. The agent, the land surveyor, register and clerks, paid for by the Indians, were to be

named by the United States; the Indians were not to go to war without the consent of the United States, except in self-defense, and then were to be protected by the United States—in fact, without proceding further with an analysis of the two treaties, it may be assumed that any one who examines them will find the Government accepting most exceptional and almost parental relations towards the Indians."

"The nation was oppressed (Art. I, Treaty 1832) by being made subject to State jurisdiction. Rather than submit to such an evil they preferred to seek a new home, where they might live and be governed by their own laws. Sympathizing with them and agreeing with them, the President entered into the treaties—treaties manifestly intended to protect the Indians, to guard them so far as possible from the hardships and evils of enforced emigration. The United States assumed therefore a peculiar trust, a trust of guardianship and control; a trust not only financial but largely personal in its nature."

Chickasaw Nation vs. United States, 22 Ct. Claims, 222.

Holden vs. Joy, 17 Wall. 211;

Choctaw Nation vs. United States, 119 U. S. 1.

By the original treaty with the Crow Indians, ratified and accepted by Congress July 25, 1868, (15 St. at L. 649), and the agreement as amended and accepted and ratified by the Act of April 27, 1904,

(33St. at L. 352), practically the same relations were created and established between the United States and the Crow Indians, as were created and established between the United States and the Chickasaw Indians by the two treaties referred to in Chickasaw Nation vs. United States, supra, the treaties refererd to, however failing to contain any express declaration of trust while the Act of April 27, 1904, amending and ratifying the agreement made with the Crow Indians does contain such a declaration in express terms.

It is true that in Article I of the original agreement and in Article I of the agreement as amended by the Act of April 27, 1904, it is stated that the Indians of the Crow reservation "do hereby cede, grant, and relinquish to the United States all right, title and interest which they may have in the lands embraced within and bounded by the following described lines;" as the agreement stood before being amended by Congress these words should be given their ordinary meaning as by the agreement it was intended that the United States should obtain the absolute title to said lands, but in the light of the amendments made to said agreement whereby the United States did not assume to acquire the absolute title to said lands but only to act as a trustee in the sale and disposal of the same, these words should be given a restricted meaning so that all articles of the amended agreement and all provisions of the Act amending and ratifying the same will be harmonious.

Worcester vs. Georgia, *supra;*

Choctaw Nation vs. United States, *supra;*

The Kansas Indians, *supra.*

The Act of April 27, 1904, amending and ratifying said agreement provides that said lands shall be subject to entry under the homestead, mineral land, townsite and reclamation laws of the United States. This provision, however, intended nothing more than that the general provisions in those laws relating to manner of procedure in making entry and final proof, establishment of residence, length of residence, cultivation and improvements should apply to entries made on these lands. It was not intended by these provisions that any of these lands should be acquired in the same manner that public lands generally are acquired under these laws. If it had been intended by this Act that this land was to be entirely segregated from the Indian Reservation and cease to be a part thereof and should become public lands and that all of the rights of the Indians thereto were to be immediately extinguished upon the passage and approval of said Act then all of said land would have become public land subject to entry not only under the homestead, mineral land, townsite and reclamation laws, but also under the desert land act and the timber and stone act. By the conditions contained in said Act specifying the particular manner in which said lands might be acquired, the prices to be paid for the same, and the disposal of the proceeds of such sales, it is clear

that Congress did not intend to have these lands revert to the public domain and become public lands, but intended them to remain within the boundaries of said reservation subject to entry and sale as provided in said Act and not otherwise.

United States vs. Blackfeather, 155 U. S. 180.

In the case of M. K. & T. Ry Co. vs. United States, 47 Ct. Cl. 59, a case arising over the question of the extinguishment of the title of certain Indians to lands under an agreement that had been ratified by Congress, the court held that such lands did not become "public lands" under said agreement, saying:

> "What was intended by the proviso to section 9 of the granting act 'Provided, That said lands become a part of the public lands of the United States'? The usual office of a proviso to a statute is too well known to require repetition. If the term 'public lands', as used in the statute, is to receive the meaning accorded it in treaties and public laws, it means 'such land as is subject to sale or other disposal under general laws.' (Newhall v. Sanger, 92 U. S. 761-763; United States v. Thomas, 151 U. S. 577-583; Northern Lumber Co. v. O'Brien, 139 Fed. R., 616.) It has been suggested that the extinguishment of the Indian title and the lands becoming public lands are synonymous terms, and that the lands having been public lands previous to Indian occupancy nothing afterwards supervened to change their character ex-

cept the incumbrance of the Indian title. The contention is in a measure correct, but the subvention of Indian title by means of treaty stipulation, a contract equally as sacred as the act of July 25, 1866, and for which a consideration proportionately as great passed, changed the character of the lands; they were no longer part of the public domain subject to disposal under general laws, and in the absence of express and explicit language did not pass under land-grant laws, even though not expressly reserved. It did not require a public survey to make them public lands, and upon the extinguishment of the Indian title if within the intent of the act they would have passed under the grant, for the railroad had long since definitely located its line of road."

* * * "As provided in section 17 of the act approved April 26, 1906, *supra, all the money arising from said sales, 'or from any source whatever,' was to be credited to said Indian tribes by the Treasury Department and thereafter paid to the Indians per capita. Public lands of the United States were not disposed of in this manner then, and they are not so disposed of now.* (Italics ours.)

The Supreme Court of the United States has defined the meaning of the words "public lands" as follows:

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

Newhall vs. Sanger, 92 U. S. 761-763.

Cited with approval in M. K. & T. Ry. Co. vs. U. S., *supra.*

These particular lands not being subject to sale or other disposal under general laws relating to the sale and disposal of public lands, but only being subject to sale and disposal in accordance with the terms of the Act amending and ratifying said agreement, they were segregated from the public lands of the United States when the original treaty was ratified by Congress and proclaimed by the President on August 25th, 1868, and have never been public lands since that date.

By the terms of the agreement as amended and ratified by the Act of April 27th, 1904, the United States was simply to act as a trustee for said Indians in the sale of said lands, said lands were not withdrawn from the Indian Reservation, and said Indians retained the right to use and occupy the same until such time or times as said lands were entered by persons desiring to acquire title to the same in accordance with the provisions of said Act. After such entries were made such right would be held in abeyance being finally extinguished upon the completion of title by and issuance to said entrymen of patent by the trustee or again attaching if such entrymen should abandon their entries.

THE AUTHORITY OF THE SECRETARY TO ISSUE GRAZING PERMITS.

That the Secretary of the Interior has power and authority to permit stock to graze on lands included within the boundaries of Indian reservations and to make and promulgate rules and regulations concerning the same and providing for the issuance of permits therefor, and that the Secretary of the Interior has made and promulgated rules and regulations concerning the grazing of stock on the Crow Indian reservation and providing for the issuance of permits therefor, is not questioned, but the appellee contends in paragraphs II and III of its answer, (Tr. pp. 11-12), that these lands were granted, relinquished and ceded to the United States by the agreement between the Crow Indians and the United States; that by the ratification of such agreement, after amendment, the right and title of the Indians were extinguished; that said lands immediately were added to the public domain and became public lands of the United States, and that therefore, said lands are not subject to the rules and regulations made and promulgated by the Secretary of the Interior concerning Indian lands and that the appellee has the right to graze its sheep on said lands in exactly the same manner that it has to graze its sheep on other public lands.

If, as contended by the appellee, these lands, by the amendment and ratification of such agreement, were added to the public domain and became

public lands upon the passage and approval of the Act amending and ratifying said agreement then the rules and regulations concerning grazing of stock on Indian reservations would not apply to the lands in question, but, if by the amendment and ratification of said agreement said lands were not added to the public domain so as to become public lands subject to sale and disposal under general laws, but remained Indian lands until finally sold and disposed of by the United States as a trustee for said Indians, then these lands until sold or disposed of by the trustee remained subject to the rules and regulations concerning grazing of stock on Indian reservations exactly the same as the unallotted Indian lands included in those portions of said reservations not opened to settlement. However, conceding merely for the purpose of argument, that the lands having been opened to settlement and sale under the terms of the agreement as amended and ratified, the rules and regulations concerning the grazing of stock on Indian reservations do not apply to such lands, yet, unless said lands became public lands of the United States subject to sale and disposal under general laws, the appellee has no more right to graze its sheep on said lands than it has to graze its sheep on lands owned by private individuals without permission so to do. The right of the appellee to graze its sheep on these lands depends entirely on the question of whether or not these lands were, by the Act amending and ratifying said agreement, added to the public domain and be-

came public lands. If by said Act the lands became public lands in every sense of the word then the appellee has such a right but if by said Act the lands did not so become public lands, the United States simply taking title thereto as a trustee to sell and dispose of the same for the benefit of said Indians, the appellee has no such right.

In its opinion (Tr. pp. 21-22), the court found, in substance, that if a trust was created by the Act ratifying said agreement, after amendment, such trust attached only to the proceeds of sales of the land and not to the land, and that even if a trust did attach to the land it was a trust to sell and gave no power to lease. From an examination of the Act amending and ratifying the agreement, we do not believe there can be any question but what a trust was created which attached not only to the proceeds of sales of said land but also attached to the land itself, and if such a trust was created which attached to the land it can make no difference to the appellee if it was a trust to sell and gave no power to lease. It is a principle, so well established that it requires no citation of authorities to sustain it, that the cestui que trust is the only person who can question the power or authority of a trustee to handle and manage the trust property. The Crow Tribe of Indians, in this particular instance, being the cestui que trust, might question the power and authority of the trustee, the United States, to issue permits for the grazing of stock on these lands, on the ground that the trust only grant-

ed power to sell and not to lease, but the appellee, having no beneficial interest in any of these lands, certainly cannot question the manner in which the terms of the trust are being carried out by the trustee, or the manner in which the trustee is handling or managing the trust property not being a party to the agreement creating such trust and having no interest of any kind in the trust property.

THE DECREE.

The Act amending and ratifying the agreement having created a trust which attached to the lands, and the lands not being added to or becoming a part of the public domain and public lands but being held in trust by the trustee to be sold and disposed of for the benefit of said Indians, the bill of complaint did state a cause for relief in equity and the appellant was entitled to the relief prayed for in the bill of complaint. The court therefore erred in holding that said bill of complaint did not state a cause for relief in equity and in holding that the appellant was not entitled to relief in equity as prayed for in the bill of complaint, and in entering the decree dismissing the appellant's bill of complaint.

It is respectfully submitted that the decree in this case should be reversed and the cause remanded to the District Court of the United States for the District of Montana, with instructions to enter a decree granting the injunctive relief prayed for by

appellant in its bill of complaint and the damages sustained by appellant ascertained and judgment for such amount included in such decree.

BURTON K. WHEELER,
United States Attorney.

HOMER G. MURPHY,
FRANK WOODY,
Assistant U. S. Attorneys, District of Montana.